

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**MICHAEL S. SMITH,**

**Petitioner,**

**CASE NO. 2:04-cv-606  
JUDGE FROST  
Magistrate Judge KING**

**v.**

**ALAN LAZAROFF, Warden,**

**Respondent.**

**OPINION AND ORDER**

On June 14, 2005, the Magistrate Judge issued a *Report and Recommendation* recommending that respondent's motion to dismiss be denied and that proceedings in this action be stayed pending petitioner's exhaustion of state court remedies. Petitioner has objected to the Magistrate Judge's *Report and Recommendation*.<sup>1</sup> See Doc. Nos. 29, 30. Petitioner states that he cannot exhaust state court remedies by filing a motion for delayed appeal with the Ohio Supreme Court pursuant to Ohio Supreme Court Rule of Practice II, Section 2(A)(4)(a)<sup>2</sup> without an attorney under Ohio Supreme

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<sup>1</sup> On June 27, 2005, petitioner filed a notice in which he indicates that he is currently placed in administrative segregation and unable to access the prison's law library, but that he intends to attempt to exhaust state court remedies as to his claims, and that he will notify the Court every thirty days regarding the status of state court proceedings. See Doc. No. 31. Thus, it appears that petitioner may have withdrawn his objections to the Magistrate Judge's *Report and Recommendation*.

<sup>2</sup> Ohio Supreme Court Rule of Practice II, Section 2(A)(4)(a) provides:

(4)(a) In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing a motion for delayed appeal and a notice of appeal. The motion shall state the date of entry of the judgment being appealed and adequate reasons for the delay. Facts supporting the motion shall be set forth in an affidavit. A copy of the court of

Court Rule of Practice I, Section 1(a), which provides:

(A) In order to file pleadings, memoranda, briefs, or other documents *other than those required to perfect an appeal*, or to participate in oral argument, attorneys shall be registered for active status with the Attorney Registration Section of the Supreme Court as required by Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio or shall have complied with the *pro hac vice* requirements of Section 2 of this rule. In death penalty cases, in addition to meeting the preceding requirements, any appointed attorney shall satisfy the certification requirements of Rule 20 of the Rules of Superintendence for the Courts of Ohio and appear on the list of attorneys certified to represent capital defendants on appeal.

*Id.* (Emphasis added.)

In order to exhaust state court remedies, petitioner must file a motion for delayed appeal with the Ohio Supreme Court.<sup>3</sup> He may do so without an attorney.

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of those portions of the *Report and Recommendation* objected to by petitioner. For the reasons discussed in the *Report and Recommendation*, petitioner's objections are **OVERRULED**.

The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. Respondent's motion to dismiss is **DENIED**. Proceedings in this action are **STAYED** pending petitioner's exhaustion of state court remedies. Petitioner is **ORDERED** to notify the Court within thirty (30) days of completion of state court proceedings. He must also advise the Court every thirty (30) days regarding the status of state court proceedings. Failure to comply with the foregoing may result in

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appeals opinion and the judgment entry being appealed shall be attached to the motion.

<sup>3</sup> Petitioner must also follow the directives of the *Report and Recommendation* regarding exhaustion of claim four. *Report and Recommendation*, at 6-7. Depending upon the nature of these allegations, he may need to raise such claim in a petition for a writ of mandamus pursuant to O.R.C. §2731.01, or in a declaratory judgment action. *See id.*

dismissal of this action.

**IT IS SO ORDERED.**

/s/ Gregory L. Frost  
GREGORY L. FROST  
United States District Judge